Supreme Court of the United States

OCTOBER TERM, 1962

No. 632

UNITED STATES, PETITIONER

vs.

AARON ZACKS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

[fol. 9] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

MOTION TO STRIKE SECOND DEFENSE—Filed February 4, 1960

Come now the plaintiffs, by their attorney, and move the Court to enter an order striking the second defense in the answer filed by the defendant on May 4, 1959.

In support of their motion plaintiffs rely on Public Law 629 approved June 29, 1956, and the accompanying brief in support of the motion.

WHEREFORE it is prayed that the motion be granted.

SCOTT P. CRAMPTON,
815 Bowen Building,
Washington 5, D. C.
Attorney for Plaintiffs.

ROBERT F. CONRAD,
Watson, Cole, Grindle & Watson,
815 - 15th Street, N. W.,
Washington 5, D. C.,
Of Counsel.

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[fol. 25] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

MOTION OF THE UNITED STATES TO DISMISS—
February 24, 1960.

Comes now the defendant, United States of America, by its attorneys, and moves the Court to dismiss the above action on the ground that the Court lacks jurisdiction over the subject matter of the petition for reason that the claim for refund was not filed within the time prescribed by law as affirmatively appears from the petition and attached affidavit of George T. Qualley.

/s/ Charles K. Rice
CHARLES K. RICE,
Assistant Attorney General.

/s/ George T. Qualley
GEORGE T. QUALLEY,
Attorney.

[fol. 26]

AFFIDAVIT OF GEORGE T. QUALLEY

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

George T. Qualley, being duly sworn deposes and says:

1. That he is an attorney with the Department of Justice, Washington, D. C., and is thoroughly familiar with the subject matter of this suit, and with the records and files of the Internal Revenue Service pertaining thereto.

2. That having examined such records and files, he finds the plaintiffs' Federal Income Tax return for the calendar year 1952 bears the marking:

Received
April 15, 1953
33 Dir. Int. Rev.
Columbus

3. That having examined such records and files, he also finds that a copy of Certificate of Assessments and Payments for the plaintiffs' 1952 account, bearing the signature of the District Director of Internal Revenue, Columbus 15, Ohio, indicates that by September 28, 1953, plaintiffs had paid the entire amount of its assessed tax liability for 1952 plus interest of $218.24.

/s/ George T. Qualley
GEORGE T. QUALLEY
Attorney
Department of Justice

[fol. 27]

City of Washington
District of Columbia

Subscribed and sworn to before me this 24th day of February, 1960.

/s/ W. E. House
Notary Public
District of Columbia

[SEAL]

My Commission expires: January 31, 1965.

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[fol. 70] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS and FLORENCE ZACKS

v.

THE UNITED STATES

Mr. Scott P. Crampton for plaintiffs. *Messrs. Robert F. Conrad*, and *Watson, Cole, Grindle & Watson* were on the briefs.

Mr. George T. Qualley, with whom was *Mr. Assistant Attorney General Charles K. Rice*, for defendant. *Messrs. James P. Garland* and *Lyle M. Turner* were on the brief.

OPINION—Decided July 15, 1960

ON PLAINTIFFS' MOTION TO STRIKE DEFENDANT'S SECOND DEFENSE AND DEFENDANT'S MOTION TO DISMISS PETITION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiffs sue for the recovery of an overpayment of income taxes by reason of having reported royalties received from patents as ordinary income. They allege that the amount paid was correctly computed according to the law, as interpreted by the rulings of the Internal Revenue Bureau, at the time it was paid, but that later Congress amended the Internal Revenue Code retroactively so as to provide that the amount received as royalties should be returned as capital gains rather than as ordinary income, which resulted in an overpayment.

The defendant interposes the defense that no claim for refund of the amount of the overpayment was filed within the statutory period. Plaintiffs reply that the amendment of the Internal Revenue Code, referred to above, created a

[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

PETITION—Filed March 5, 1959

To the Honorable United States Court of Claims:

Plaintiffs respectfully represent to the Court:

1. This is an action to recover income taxes paid by the plaintiffs for the calendar year 1952 in the amount of $10,636.06 and is brought under the provisions of 28 U. S. C. § 1491 and § 117(q) of the Internal Revenue Code of 1939, as added by Public Law 629, approved June 29, 1956.

2. Plaintifis are individuals residing at 140 North Parkview Road, Columbus, Ohio. They bring this action in their own right.

3. For the calendar year 1952 plaintiffs as husband and wife filed a joint Federal income tax return in which they reported a taxable net income of $45,619.89 and an in-
[fol. 2] come tax liability of $19,781.14 which was paid by them within the time allowed by law.

4. Plaintiffs keep their books and records and file their Federal income tax returns on the cash receipts and disbursements basis of accounting and by calendar years. The income tax return and the claim for refund here involved were filed with the District Director of Internal Revenue for the Eleventh District of Ohio at Columbus, Ohio.

5. The plaintiff Florence Zacks is an inventor and the holder of United States Letters Patent numbered 2,422,161; 2,441,785; 2,497,808; and 2,563,092. All of her substantial rights in the aforesaid patents were transferred by Florence Zacks to a manufacturing corporation in exchange for its agreement to pay royalties to her at the rate of 3 per cent upon the manufacture and sale or use of products covered by said inventions.

6. During 1952 plaintiff Florence Zacks received $36,768.65 as royalties from the manufacturing corporation in connection with its use of the aforesaid patents. The items involved, the number of the patent pertaining to each, and the amount of the royalties paid to Florence Zacks in 1952 on each invention are respectively as follows:

Name of Invention	Patent Number	Royalty Received
Lady Barry Shoulder Pads	2,422,161	$ 6.96
Barry Foam Shoulder Pads	2,441,785	1,550.98
Barry Bone Shoulder Pads	2,497,808	150.10
Angel Treads Slippers	2,563,092	35,060.61
		$36,768.65

7. In their Federal income tax return for 1952 plaintiffs reported the aforesaid royalties in the amount of $36,768.65 as ordinary income. This action on the part of plaintiffs was in accord with the then existing rul- [fol. 3] ings of the Internal Revenue Service.

8. On June 29, 1956, Congress enacted Public Law 629 which added § 117(q) to the Internal Revenue Code of 1939. The new provision was made applicable to the calendar year 1952. Under said § 117(q) royalties paid as a result of a transfer of all substantial rights to a patent may be reported by the inventor as long-term capital gains. The royalties received by plaintiff in 1952 resulted from a transfer by her of all substantial rights to her patents within the provisions of § 117(q) of the Internal Revenue Code of 1939.

9. On or about June 23, 1958, plaintiffs filed a claim for refund on Treasury Department Form 843, in which they sought a refund of $11,076.68 on the ground that they

had included as ordinary income in their return for 1952 royalties which they had received as aforesaid and which under Public Law 629 referred to above were taxable as long-term capital gain.

10. More than six months have elapsed without any action having been taken by the Commissioner of Internal Revenue with regard to the aforesaid claim for refund.

11. No part of the taxes paid by plaintiffs as aforesaid has been refunded. Based on the facts herein stated and after allowing all just credits and offsets, plaintiffs are justly entitled to recover the sum of $10,636.06 of the taxes paid together with interest thereon from the dates of payment as provided by law.

12. Plaintiffs are the sole owners of the claim herein sued upon. No transfer or assignment has been made of said claim and no action other than as aforesaid has been had thereon. Plaintiffs have exhausted their administrative remedies.

[fol. 4] WHEREFORE, plaintiffs demand judgment against defendant for $10,636.06, together with interest and costs as provided by law.

AARON ZACKS AND FLORENCE ZACKS,
Plaintiffs,

By SCOTT P. CRAMPTON,
815 Bowen Building,
Washington 5, D. C.,
Attorney for Plaintiffs.

ROBERT F. CONRAD,
Watson, Cole, Grindle & Watson,
815 - 15th Street, N.W.,
Washington 5, D. C.

Of Counsel.

[fol. 5]

IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

ANSWER—Filed May 4, 1959

For its answer to the Petition, defendant admits, denies and alleges as follows:

FIRST DEFENSE

I.

Admits that this purports to be an action of the nature described in Paragraph 1; denies, however, that it has any basis in fact; and, denies this Court has any jurisdiction over the subject matter of the action for reasons hereinafter set forth in the affirmative or second defense.

II.

Admits the allegations contained in Paragraph 2, except denies that plaintiffs have any "right" to bring this action.

[fol. 6]

III.

Admits the allegations contained in Paragraph 3.

IV.

Denies the allegations contained in Paragraph 4, not otherwise expressly admitted in this answer.

V.

Denies the allegations contained in Paragraph 5 for lack of information sufficient to form a belief as to the truth thereof.

VI.

Denies the allegations contained in Paragraph 6 for lack of information sufficient to form a belief as to the truth thereof.

VII.

Admits the allegations contained in Paragraph 7, except denies that it has information sufficient to form a belief as to the source of royalties reported on plaintiffs' 1952 income tax return, and avers that the amount reported thereon was $38,604.55 instead of as alleged therein.

VIII.

Regarding Paragraph 8: admits the allegation contained in the first sentence; denies that the allegations in the second and third sentences accurately and completely describe the statutory provision referred to therein; and, denies the allegations contained in the fourth sentence.

IX.

Admits that plaintiffs filed a claim for refund in the manner alleged in Paragraph 9, but specifically denies [fol. 7] each and every substantive allegation made therein, and further denies that such claim was duly filed within the time allowed by law as hereinafter set forth in the affirmative or second defense.

X.

Admits the allegations contained in Paragraph 10.

XI.

Admits the allegation in the first sentence of Paragraph 11 but denies all the allegations subsequent thereto.

XII.

Denies the allegations contained in Paragraph 12 for lack of information sufficient to form a belief as to the truth thereof.

SECOND DEFENSE

A.

Plaintiffs filed their joint income tax return for the year 1952 on April 15, 1953, and made their last payment on the 1952 income tax on or before September 28, 1953.

B.

Plaintiffs filed a claim for refund of 1952 income taxes on June 23, 1958.

C.

Section 7422(a) of the Internal Revenue Code of 1954 provides that no suit or proceeding shall be maintained in any Court for recovery of any internal revenue tax until a claim for refund has been duly filed. Section 322(b)(1) and Section 6511(a) of the 1939 and 1954 Internal Reve-
[fol. 8] nue Codes respectively, provide that no claim for refund may be credited or paid unless it was filed within three years from the time of filing the return or within two years from the time that the tax was paid, whichever is later.

D.

Section 117(q) of the Internal Revenue Code of 1939, added by Public Law 629, approved June 26, 1956, neither extends the aforesaid limitation for filing of refund claims nor does it provide a new cause of action against the United States.

E.

Plaintiffs' action for refund of income taxes for the year 1952 is consequently barred by the express statutory provisions referred to in Paragraph C and the Court lacks jurisdiction over the subject matter of this action.

Wherefore, defendant prays that the Petition be dismissed with costs assessed against the plaintiffs.

CHARLES K. RICE,
Assistant Attorney General.

GEORGE T. QUALLEY,
Attorney.

[fol. 84] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

ORDER OF THE COURT ENTERING JUDGMENT—
July 6, 1962

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

NOW, THEREFORE, IT IS ORDERED that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

BY THE COURT,

MARVIN JONES,
Chief Judge.

[fol. 85]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 86] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS, PLAINTIFFS

vs.

THE UNITED STATES, DEFENDANT

DEPOSITION

* * * *

[fol. 87] FLORENCE ZACKS

being by me first duly sworn, as hereinafter certified, deposes and says as follows:

DIRECT EXAMINATION

BY MR. CRAMPTON:

Q. Mrs. Zacks, will you state your full name, please?
A. Florence Zacks.
Q. And what is your occupation?
A. I am an inventor.
Q. How long have you been engaged in that occupation?
A. Since 1945.
Q. Have any United States Patents ever been issued to you?
A. Yes.

* * * *

[fol. 88] Q. Now, we have talked so far about four or five patents. Have other patents been issued to you?
A. Yes.
Q. Do you know roughly how many?
A. I'm afraid I don't know how many. I can think of two specific ones at the moment in addition, or there are—I don't know just how many, Mr. Crampton, but I think of three others—four others at this moment that I have in addition to those that were on exhibits here.
Q. That have been issued to you?
A. That have been issued to me.

new cause of action, and that the statute of limitations did not begin to run until after its passage.

[fol. 71] The Act upon which plaintiffs rely is Public Law 629, passed on June 29, 1956 (70 Stat. 404). It added section 117(q) to the Internal Revenue Code of 1939. This section reads:

> (q) *Transfer of Patent Rights.*—
>
> (1) *General Rule.*—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—
>
> (A) payable periodically over a period generally coterminous with the transferee's use of the patent.
>
> (B) contingent on the productivity, use, or disposition of the property transferred.
>
> * * * * *
>
> (4) *Applicability.*—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred. [Added by § 1 of the Act of June 29, 1956, c. 464, 70 Stat. 404]

The taxable year in question is 1952; thus, section 117 (q) applies to this taxable year, and if it created a new cause of action, plaintiffs' suit is in time, having been filed just a few days less than two years from the passage of the Act.

Plaintiffs' petition alleges that the law in effect prior to the passage of the Act of June 29, 1956, was construed by the Internal Revenue Bureau to require a taxpayer to report patent royalties as ordinary income. The defendant admits this in its answer. For the rulings of the Bureau see Mim. 6490, 1950-1 Cum. Bull. 9; Revenue Ruling 55-58, 1955-1 Cum. Bull. 97.

However, at the time of the passage of P.L. 629, *supra*, there were a number of court decisions to the contrary:

Myers v. *Commissioner*, 6 T.C. 258; *Kronner* v. *United States*, 126 Ct. Cl. 156; *United States* v. *Carruthers*, 219 F. 2d 21 (C.A. 9th); *Commissioner* v. *Celanese Corp.*, 140 F. 2d 339 (C.A.D.C.); and *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (C.A. 2d). But, notwithstanding these court [fol. 72] decisions, the Bureau of Internal Revenue persisted in its interpretation and continued to require taxpayers to report such income as ordinary income.

It is well settled law, needing no citation of authority, that a taxpayer is bound to follow the interpretations of the law by the agency charged with its administration. This being true, plaintiffs had no option other than to report the income from patent royalties as they did report them. If plaintiffs believed that the interpretation of the law was incorrect, they were of course entitled to file a claim for refund and undertake to convince the Bureau of Internal Revenue of its error, and, in default thereof, they were entitled to bring suit to test the matter in the courts, as other taxpayers had done. The plaintiffs instead, no doubt influenced by the failure of other taxpayers to secure a reversal of the Bureau's rulings, did not question the correctness of what the governmental agency in charge of the enforcement of the law had ruled, but acquiesced in it, and paid their taxes accordingly.

Then, in view of the stubborn persistence of the Bureau in its interpretation of the law, and of its refusal to follow the decisions of this court and of three of the Circuit Courts of Appeals and of the Tax Court, Congress felt it necessary to pass an Act to set aside the law as interpreted by the Bureau, and to expressly provide that income from royalties might be reported as capital gains.

We think this gave to a taxpayer a right that he had not had before. At least, it gave him a right which the agency charged with the administration of the prior law said he did not have.

Furthermore, we think Congress must have intended to give some taxpayers a right which it must have known had long since been barred by the statute of limitations. Public Law 629 was passed on June 29, 1956; it was made applicable to all taxable years beginning after May 31, 1950; Congress must have known that the statute of limitations, which requires the filing of a claim for refund

within three years after the return was filed, or within two years from the time the tax was paid, had long since run as to many taxpayers with respect to several of the years to which Public Law 629 was applicable?

[fol. 73] Defendant says Congress intended Public Law 629 to apply only to those taxpayers who had filed claims for refund within time. There is no such express limitation and there is nothing in the Act itself or in its history to indicate Congress had any such intention. The Act was made applicable to the barred years without restriction.

We cannot escape the conclusion that, at least insofar as taxable years barred by the statute of limitations are concerned, Congress intended by the passage of Public Law 629 to give taxpayers a right which they did not have before its passage. Had they not so intended, it was an idle gesture to have made it applicable to years as far back as 1950.

In *Verckler* v. *United States*, No. 361-57 Ct. Cl., decided March 4, 1959, 170 F. Supp. 802, we held that the remedial legislation involved in that case created a new cause of action and that a suit to recover was not barred because a claim for refund had not been filed within three years from the time the return was filed, or within two years from the time the taxes were paid. The Second Circuit Court of Appeals, in *Hollander* v. *United States*, 248 F. 2d 247, was of the same opinion. However, the Sixth Circuit Court of Appeals, in *United States* v. *Dampster*, 265 F. 2d 666, and the Fifth Circuit in *Tobin* v. *United States*, 264 F. 2d 845, were of a contrary opinion. We are convinced of the correctness of the view we take of the instant case and, therefore, notwithstanding our great respect for the Fifth and Sixth Circuit Courts of Appeals, we must decline to follow them.

It results that plaintiffs' motion to strike the defendant's second defense, raising the issue just discussed, must be granted. This defense will, therefore, be stricken. Defendant's motion to dismiss plaintiff's petition is denied.

The case is returned to the Trial Commissioner for further proceedings not inconsistent with this opinion.

It is so ordered.

DURFEE, *Judge*; LARAMORE, *Judge*; MADDEN, *Judge*; and JONES, *Chief Judge*, concur.

[fol. 74] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

AMENDMENT TO THE PETITION—Filed November 29, 1961

Pursuant to leave of Court the introductory two sentences of paragraph 6 of the petition are amended to read as follows:

6. During 1952 plaintiff Florence Zacks received $36,768.65 as royalties from the manufacturing corporation in connection with its use of the aforesaid patents and the antecedent patent application in the case of patent No. 2,563,092. The items involved, the number of the patent pertaining to each invention, and the amount of the royalties paid to Florence Zacks in 1952 on each invention are respectively as follows:

AARON ZACKS AND FLORENCE ZACKS,
Plaintiffs,

By SCOTT P. CRAMPTON,
404 Transportation Building,
Washington 6, D. C.,
Attorney for Plaintiffs.

ROBERT F. CONRAD,
Watson, Cole, Grindle & Watson,
815 - 15th Street, N. W.,
Washington 5, D. C.,
Of Counsel.

[fol. 76] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

ANSWER TO PLAINTIFF'S AMENDMENT TO THE PETITION—filed December 1, 1961

The defendant, the United States of America, files its answer to plaintiffs' amendment to the petition as follows:

6. Denies the amendment to the first two sentences of paragraph 6.

WHEREFORE, defendant prays that plaintiff take nothing herein, that its petition be dismissed, that defendant recover its costs of Court and for such other and further relief to which defendant may be justly entitled.

LOUIS F. OBERDORFER
Assistant Attorney General

JERRY M. HAMOVIT
Attorney

[fol. 78] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

[Title Omitted]

STIPULATION—Filed July 2, 1962

It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to plaintiffs' proposal of December 11, 1961, as amended on June 4, 1962, accepted on behalf of defendant on June 6, 1962, the following facts may be taken as true, for the purpose of this proceeding only:

1. In their tax return filed for the calendar year 1952 plaintiffs reported $38,604.55 as income from "Royalties." Of this amount $15,035.98 was received in exchange for the transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights to certain [fol. 79] patents held by taxpayer Florence Zacks, whose efforts created such property. The transfer by Florence Zacks just referred to was to a corporation less than 50% of the stock of which she owned, directly or indirectly.

2. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $2,169.00 for "Contributions." The plaintiffs agree that this amount may be reduced to $1,784.00.

3. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $306.00 for "legal fee re work on patents." Plaintiffs agree that this amount may be disallowed as a deduction.

4. Upon the basis of the facts hereinabove set forth and those admitted in the pleadings, the parties hereto consent to the entry of judgment in favor of plaintiffs in the amount of $4,624.09 with interest thereon as allowed by law in full satisfaction of the claim alleged in the petition herein.

Nothing contained herein shall be construed to prejudice the Government's right to file a petition for certiorari [fol. 80] in the Supreme Court to review the question

whether taxpayers' claim for refund and suit in the Court of Claims were timely filed. Nothing contained herein shall be construed to affect taxpayers' tax liability for any year other than 1952.

/s/ SCOTT P. CRAMPTON
Attorney for Plaintiffs

/s/ LOUIS F. OBERDORFER
Assistant Attorney General

[fol. 81] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS AND FLORENCE ZACKS

v.

THE UNITED STATES

MEMORANDUM REPORT FOR JUDGMENT—Filed July 3, 1962

To the Honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The petition in the above-entitled cause was filed on March 5, 1959, to recover the sum of $10,636.06, plus interest. The claim is for the recovery of an alleged overpayment on plaintiffs' 1952 income taxes in that royalties received by them were reported as ordinary income, whereas, pursuant to Public Law 629 approved June 29, 1956, which was applicable to the year 1952, such royalties as were herein involved (i.e., paid as a result of a transfer of all substantial rights to a patent) were permitted to be reported by the inventor as long-term capital gains.

On May 4, 1959, defendant filed its answer herein in which, as a second defense, it alleged lack of jurisdiction in the court over the subject matter in that plaintiffs had not, prior to the passage of Public Law 629, filed a claim for refund of the amount of the overpayment within the statutory period and that said Public Law neither extended the time for the filing of such claims nor created a new cause of action.

[fol. 82] On February 4, 1960, plaintiffs filed a motion to strike said second defense, and by decision of July 15, 1960, the court granted said motion and returned the case to the trial commissioner for further proceedings.

Thereafter, a trial was had and proof was closed. However, prior to the filing of the commissioner's report, a written stipulation, signed by plaintiffs' attorney of record and by Assistant Attorney General Louis F. Oberdorfer,

was filed herein, which settles all the issues in the case except the issue decided by the court. The stipulation provides as follows:

It is hereby stipulated and agreed by and between the parties, through their respective counsel, that, pursuant to plaintiffs' proposal of December 11, 1961, as amended on June 4, 1962, accepted on behalf of defendant on June 6, 1962, the following facts may be taken as true, for the purpose of this proceeding only:

1. In their tax return filed for the calendar year 1952 plaintiffs reported $38,604.55 as income from "Royalties." Of this amount $15,035.98 was received in exchange for the transfer (other than by gift, inheritance or devise) of property consisting of all substantial rights to certain patents held by taxpayer Florence Zacks, whose efforts created such property. The transfer by Florence Zacks just referred to was to a corporation less than 50% of the stock of which she owned, directly or indirectly.

2. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $2,169.00 for "Contributions." The plaintiffs agree that this amount may be reduced to $1,784.00.

3. In their tax return filed for the calendar year 1952 taxpayers claimed a deduction of $306.00 for "legal fee re work on patents." Plaintiffs agree that this amount may be disallowed as a deduction.

4. Upon the basis of the facts hereinabove set forth and those admitted in the pleadings, the parties hereto consent to the entry of judgment in favor of plaintiffs in the amount of $4,624.09 with interest thereon as allowed by law in full satisfaction of the claim alleged in the petition herein.

[fol. 83] Nothing contained herein shall be construed to prejudice the Government's right to file a petition for certiorari in the Supreme Court to review the question whether taxpayers' claim for refund and suit in the Court of Claims were timely filed. Nothing contained herein shall be construed

to affect taxpayers' tax liability for any year other than 1952.

Based on the foregoing, it is recommended that an order be entered as follows:

This case comes before the court on a stipulation of the parties filed July 2, 1962, signed on behalf of the plaintiffs and the defendant by their respective attorneys, in which it is stated that a proposal was submitted by the plaintiffs and was duly accepted on behalf of the defendant, whereby plaintiffs agreed to accept the sum of $4,624.09, with interest thereon as allowed by law, in full settlement of all claims set forth in the petition, without prejudice, however, to defendant's right to file a petition for certiorari in the Supreme Court to review the question whether plaintiffs' claim for refund and suit herein were timely filed, and the defendant consented to the entry of judgment in that amount and upon such condition.

NOW, THEREFORE, IT IS ORDERED that judgment be and the same is entered for the plaintiffs in the sum of four thousand six hundred twenty-four dollars and nine cents ($4,624.09), with interest thereon as allowed by law.

Respectfully submitted,

/s/ Saul Richard Gamer,
SAUL RICHARD GAMER,
Commissioner.

Q. Do you have patent applications pending that may not have been issued other than those that you mentioned?

A. Yes, I do.

Q. Now, have you ever perfected any invention or improvements which have not been patented?

A. Yes.

Q. And have you ever received any royalties on such unpatented inventions?

[fol. 89] A. No, not to my knowledge.

Q. Would Swishees be a—

A. Oh, yes.

Q. The type of thing I am referring to.

A. Yes.

Q. So then your answer that you have received others?

A. Yes.

* * * * *

[fol. 90] CROSS-EXAMINATION

BY MR. HAMOVIT:

Q. Mrs. Zacks, you and your husband first went into business back in 1945, didn't you?

A. I went into business myself, and my husband was involved in—he was employed somewhere else.

Q. I see. And what was that business back in 1945?

A. In 1945, actually, I did this on my own, and it wasn't too much of a business. I had someone manufacture my invention.

Q. What was your product?

A. It was a wired shoulder pad, snap-on shoulder pad.

Q. Similar to any of these items that we've referred to?

[fol. 91] A. Yes.

Q. As Exhibits 4, 6 and 7?

A. Yes.

Q. Which one was it?

A. It was this one right here. (Indicating.)

Q. Would you tell me the number in the lower right-hand corner on the first page?

A. Yes, if I can read it, it says "No. 4," I think, doesn't it?

Q. That's the item that you referred to as Barry Foam or Barry Bone?

A. At that time it was not called—no, not Barry Foam, Lady Barry.

Q. Lady Barry?

A. But at that time it was not called that.

Q. I see. But it was substantially the same product?

A. Yes.

Q. And then later you started making other products, I assume?

A. Not me, no.

Q. But the business that you and subsequently your husband got into, called Shoulda-Shams, I believe?

A. Well, Shoulda-Shams is the same item.

Q. Lady Barry?

[fol. 92] A. Yes. There is a long story involved with the change of name, and I don't think it has any bearing on this case.

Q. Well, let's hear the story.

A. Well, originally the shoulder pad was called "Shoulda-Molder," and there was a company in New York who had a shoulder—was in the shoulder pad business and had a similar name, and so they requested that we change the name, and we did.

Q. And when did your husband decide to go into business with you?

A. Well, let me see now. You see, my husband worked with me only part time to begin with, and I can't tell you the exact period of time that it was, because I really don't remember. It wasn't until after this company was formed that my husband devoted full time to the business, and then I became sort of a—that's when I got into the invention business. I mean, as far as our contracts and everything were concerned. And this company was formed, and Mr. Streim eventually became a partner in the business.

* * * *

[fol. 93] Q. So that was really what you were patenting, the foam rubber sole and the elastic grip?

A. That's right.

MR. CRAMPTON: I would like to note an objection. I think the Patent speaks for itself on what was patented.

THE WITNESS: I haven't gone over this for many years.

Q. That was your idea?

A. That was my understanding. Now, as to the claims, I haven't gone over in years. Now, I have many patents, and I possibly could have overlooked the specific claims.

* * * *

[fol. 94] Q. I see. Since 1948 have you engaged in business?

[fol. 95] A. I have been an inventor, that's all.

Q. You have developed these products. That's what you mean?

A. Yes.

Q. The products that are manufactured either under the name of Angel Treads or Barry Foam or Barry Bone or Lady Barry, or the products that H. B. Kleinert—

A. Well, actually I have developed many more products than these.

Q. Would you tell us what they are?

A. Well, I can tell you some of them.

Q. Please do.

A. I have developed a lot of other products that you haven't mentioned. I have developed the cover for playpen pad, for instance.

Q. Is that manufactured?

A. No, it's not being manufactured.

Q. Is it patented?

A. Yes.

Q. Has it ever been manufactured?

A. Yes, it has been manufactured.

Q. In quantities?

A. I would say on a test basis.

Q. It proved unsuccessful on test?

A. Well, it proved unsuccessful at that particular time. [fol. 96] It could be that if another manufacturer, one that was engaged in the infant wear business, were in it, they might. And there is a similar product now on the market. It doesn't have my patented features, but it is a similar product.

Q. Did you ever discuss with any other manufacturers the handling of this product?

A. I discussed it with a—some of the buyers in the infant wear departments. I still hope some day that I will get someone to—I just simply haven't had the time to do it, but I do hope some day that some infants wear manufacturer will take on this item and produce it.

Q. What other products do you have, Mrs. Zacks?

A. I have a patent on a certain chair cushion that has a patented feature. I have a patent—

Q. Is it manufactured?

A. It is not.

Q. Has it ever been?

A. Yes.

Q. By whom?

A. By the R. G. Barry Corporation.

Q. In quantity?

A. Well, that's hard to say whether you would think it was in quantity or not. I don't recall the amount of volume business that was done on it, but the company [fol. 97] decided that the item was too high priced at that time, and that they would discontinue it, and that perhaps at some future time they could bring it out with cheaper materials for a cheaper price. But at that time the company decided to discontinue it.

Q. Any other items?

A. Yes. I had a little cotton turban that I had a patent on. There was some others that I just don't recall right now.

Q. Do you think it's at all fair to say, Mrs. Zacks, that you could be termed a designer?

A. Well, that's a matter of interpretation on how you mean it. I think you would have to be a little more specific. I could be a designer, possibly, maybe I have the capabilities. This would depend on the people who wanted to hire me as a designer, I don't know.

Q. You never worked, I suppose, with machinery?

A. No.

Q. Your activities have been devoted to the sort of product that can be handled with fabrics and a sewing machine?

A. Yes. And, of course, the reason for that, I say, my experience and my background is department store oriented.

Q. I see. Do you have any other products other than those you have already named?

[fol. 98] A. I have had ideas that I've worked on in lots of different fields. I thought one time about—there was some wire products that I thought about that was entirely afield from the notions department. Also then there was another item that—I can't remember all the e patents have and all the products I developed, but I have done work on other items that were not in the department store area, too.

Q. Have you gotten any other patents?

A. No.

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[fol. 99] IN THE
UNITED STATES COURT OF CLAIMS

No. 104-59

AARON ZACKS, ET AL, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

WASHINGTON, D. C.
TUESDAY, October 10, 1961
at 10:00 o'clock a.m.

TESTIMONY FOR PLAINTIFF

• • • • •

[fol. 100] THE WITNESS: My name is Florence Zacks, 140 North Parkview Avenue, Columbus, Ohio.

DIRECT EXAMINATION

BY MR. CRAMPTON:

Q. What is your occupation, Mrs. Zacks?
A. I am a creator of products.
[fol. 101] Q. Do you have a number of patents?
A. Yes, I do.
Q. How many would you say?
A. I am not sure. Maybe about fourteen, I think. I think I would have to call on records for the exact number, but I think I own about fourteen patents.
Q. You have some patents, some patent applications pending?
A. Yes, I do.
Q. About how many?
A. Right now I have one.

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[fol. 102]

SUPREME COURT OF THE UNITED STATES

No....., October Term, 1962

UNITED STATES, PETITIONER

vs.

AARON ZACKS AND FLORENCE ZACKS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 4, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3rd, 1962.

/s/ Earl Warren
Chief Justice of the United States.

Dated this 4th day of October, 1962.

[fol. 103]

SUPREME COURT OF THE UNITED STATES

No. 632 ....., October Term, 1962

UNITED STATES, PETITIONER

vs.

AARON ZACKS, ET AL.

ORDER ALLOWING CERTIORARI—January 14, 1963

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 679428 971